

Respondent argues the Board should dismiss this appeal for lack of jurisdiction. But in the event the Board finds there is jurisdiction, respondent argues that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges he sustained a work-related accident while unloading pallets of frozen meat. The difficulty in this matter stems from claimant's testimony as to the date of this injury and his resulting symptoms.

At the preliminary hearing, claimant was asked to indicate the date or dates of his alleged accident for purposes of obtaining the appropriate stipulations from respondent. After a long discussion, claimant settled upon October 17, October 27 and December 2, 2007, each in the alternative.² It is clear that regardless of the date of claimant's alleged accident, whether by acute injury or over a series of dates, respondent denies the existence of an accident arising out of and in the course of claimant's employment and that he gave appropriate and timely notice of any alleged accident.³

At the hearing claimant testified as to the circumstances surrounding his alleged accident. The best that can be gleaned from this testimony is that sometime in October 2007 claimant says that he suffered from an acute, immediate onset of pain following an audible "pop" in his mid-back. Claimant maintains that his supervisor and a coworker heard this "pop" and/or observed his immediate onset of pain. This testimony is uncontroverted by either of these other individuals. But the medical records do not support all of claimant's recitations of either the date of service in relation to the accident, the mechanism of injury, the date of injury, or the source of his resulting pain or his symptoms. And claimant's symptoms are, rather bizarre and include seizure-like complaints. At one point in the hearing, he explained that -

My right hand would go out in an extended, you know, paralysis type state, and my right toes would also go into a prone position and they would just violently ache and shake to where I just couldn't control it, and they would last anywhere from a minute and-a-half, maybe two minutes at the most. And I could tell when they were coming on and when they were going, I would get a sharp pain going up the back of my neck and then all of a sudden that's when my hand would lock up, and as they

² This last date was claimant's last date worked and failing any other date, the ALJ opted to select this date as a potential date of accident for claimant's alleged series of accidents under K.S.A. 2005 Supp. 44-508(d).

³ P.H. Trans. at 4-12.

would start to dissipate, for some reason it would go over to my left leg, about the knee area, and it was just a straight burning sensation that went down until it just went - you could feel it go out the end of my toes.⁴

After reviewing all the evidence offered by the parties, including claimant's discovery deposition, the ALJ denied claimant's request for benefits. Without expressly ruling on the underlying compensability issues, he concluded that claimant's credibility was significantly compromised, so much so that he denied benefits. And now claimant has appealed.

The difficulty for this Board Member is that without a more specific order indicating the reason for the ALJ's decision, it is a challenge to determine whether there is jurisdiction for review. K.S.A. 44-534a(a)(2) limits the Board's authority to review preliminary hearing decisions.

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply.

As noted by the respondent, the ALJ's Order makes no mention of whether the ALJ concluded claimant sustained his evidentiary burden to establish any of the issues reflected above. And if claimant prevailed on those issues but merely failed to persuade the ALJ that he was entitled to TTD and medical treatment, then the Board has no authority to review this appeal. Subject to K.S.A. 44-551, an ALJ has the sole jurisdiction to decide issues of TTD and the need for medical treatment at preliminary hearings.

Moreover, claimant's application for review makes no reference to K.S.A. 44-534a. Instead, claimant references K.S.A. 44-551, a statute that authorizes an appeal from a preliminary hearing only when it is alleged that the ALJ exceeded his jurisdiction. Here, claimant does not allege that the ALJ exceeded his jurisdiction. Claimant merely complains that the ALJ made the wrong decision in light of claimant's own testimony that he was a poor historian. Put simply, claimant admitted he could not precisely remember the day or days of his injury so the lack of specificity should be overlooked when weighing his credibility and that of his claims.

After reviewing the entire record, this board member concludes that the ALJ must have concluded that claimant failed to meet his evidentiary burden of establishing a compensable claim and denied benefits. That decision triggers jurisdiction under K.S.A. 44-534a and this Board Member finds that on each of those jurisdictional issues the claimant's credibility is, as noted by the ALJ, so eroded that the ALJ's preliminary hearing Order should be affirmed.

⁴ *Id.* at 20-21.

Claimant's testimony is consistently less than consistent on the date of accident and sequence of his treatment. Moreover, his recitation of complaints is difficult to accept absent a more detailed medical explanation. Thus, even though his testimony as to notice, method of injury and resulting complaints remains uncontroverted, his testimony does not carry the day. This Board Member agrees with the ALJ's analysis that it is difficult to accept claimant's recitation of events. And that significant lack of credibility is fatal to his preliminary hearing request.

The ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 12, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: James R. Roth, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁵ K.S.A. 44-534a.